DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. STAPLES, INC. and WINSTON JOEFIELD Respondents	Case Nos.: I-00-30117 I-00-30146

FINAL ORDER

I. Introduction

By Notice of Infraction (No. 00-30117), the Government charged Respondents, Staples, Inc. and its store manager, Winston Joefield, with a violation of D.C. Code § 47-2827(a), which prohibits selling food without a food product license. The infraction is alleged to have occurred on December 7, 2000 at the Staples store located at 1250 H Street, NW. The Government seeks a $500.00 fine for the alleged violation.

On January 9, 2001, this administrative court issued a default order based on Respondents' failure to answer the first Notice of Infraction within twenty (20) calendar days (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715), as mandated by law and as instructed on the Notice of Infraction. The Order assessed a statutory penalty of $500.00 and required the Government to serve a second Notice of Infraction. A second Notice (No. 00-30146) was filed on January 22, 2001.

II. Summary of the Evidence

Respondents answered and filed a timely plea of Admit with Explanation to the second Notice of Infraction on February 12, 2001, along with a request for suspension or reduction of the fine. Respondents asserted that in 1999 they did not receive an annual renewal notice for the food product license that they had regularly received from the Department of Consumer and Regulatory Affairs ("DCRA") in each prior year. Respondents represented that this was the reason they initially failed to renew their license when it lapsed on December 31, 1999. To support their contention, Respondents' submission included a copy of a letter sent to DCRA on December 28, 1999 together with payment for the renewal of their license for the year 2000. The Government does not challenge these assertions. According to Respondents' submission, they again contacted DCRA by telephone after being charged with a November 2000 infraction by the Department of Health. Respondents assert that they spoke with a DCRA employee, whom they say identified himself only as "Anthony." Respondents state that "Anthony" informed them that their payment for the renewal was not on record and represented that he would call them once he had investigated the matter further. After receiving no response from "Anthony" or other personnel at DCRA, Respondents assert that they "tried on at least six [subsequent] occasions" to contact someone in DCRA and that they left several voicemail messages, but no messages were returned.[1]

[1] To the extent Respondents' submission can be read as asserting an estoppel defense against the Government, that defense cannot prevail. As a matter of law, the Respondents cannot assert estoppel against the Government in its sovereign capacity based only on claims that they relied on alleged representations made by its employees and annual notices of renewal. *See* e.g. *Heckler v. Community Health Services*, 467 U.S. 51, 60 (1989); *INS v. Miranda*, 459 U.S. 14 (1982).

For reasons unknown, DCRA failed to renew the license at any time after December 28, 1999. Approximately nine months after their annual license lapsed, in September of 2000, Respondents were charged by the Department of Health's Food Protection Division with the unlicensed sale of food products. Respondents were charged with the same offense a second time in November of 2000. Respondents admitted to liability for both infractions and paid the specified fines imposed.

Respondents assert that on January 12, 2001, more than a year after the lapse of their license, they elected to send DCRA a second letter along with an application and payment for the renewal of the license. A delivery notification from the United Parcel Service, which is appended to Respondents' submission, indicates that the January 12 letter was received and signed for by a DCRA employee on January 16, 2001. Respondents contend that the check sent on January 12, 2001 was not presented for payment. Respondents further argue that they have done all they can to comply with the law, and as a result, the applicable fine and penalty should be reduced or suspended. By Order of March 16, 2001, the Government was given the opportunity to respond to the Respondents' submission and elected not to do so. Because no response from the Government has been received, this matter is now ripe for decision.

III. Findings of Fact

Based on Respondents' submission of February 27, 2001, the absence of any response from the Government, and the entire record in this case, this administrative court finds by a preponderance of the evidence that:

1. Respondents operate a retail store located at 1250 H Street, NW in Washington, DC. This store sells certain food items that require a food product license that is issued by DCRA, but regulated by the Department of Health's Food Protection Division.
2. By their plea of Admit with Explanation, Respondents have admitted to the factual elements underlying the charge of operating without a food product license.
3. Respondents did not have a valid food product license for the Staples store on December 7, 2000, the date of the charged infraction.
4. Respondents did not receive an annual license renewal notice from DCRA in 1999. On or about December 28, 1999, Respondents wrote to DCRA seeking to renew their license and enclosing payment of $111.00. For reasons unknown, DCRA neither cashed the check tendered by Respondents nor issued the requested license. For over ten months, from January of 2000 through November of 2000, Respondents took no steps to pursue the matter of their lapsed license or DCRA's failure to renew it.
5. In September of 2000 and again in November of 2000, Respondents received two separate Notices of Infraction for selling food products without a license. Respondents admitted to the infractions and paid the specified fines for each of them.
6. Sometime after issuance of the November 2000 Notice of Infraction, Respondents began to undertake efforts to contact DCRA by phone in order to pursue their legally mandated food license. DCRA took no action in response to these contacts and did not issue a license to Respondents on or before December 7, 2000, the date of the infraction at issue in this case.
7. On January 12, 2001, more than a year after the 1999 license had lapsed, Respondents sent DCRA a letter of inquiry together with an application and payment for renewal

of the license. The record placed before the administrative court reflects that this letter was the first writing transmitted to DCRA regarding the absence of Respondents' food product license since December of 1999.

8. Respondents have offered no evidence to mitigate or excuse their untimely response to the Notice of Infraction (00-30146), and there is no evidence otherwise available in the record to support reducing or suspending the statutory penalty.

IV. Conclusions of Law

1. By their plea of Admit with Explanation, Respondents have admitted to a violation of D.C. Code § 47-2827(a) for selling food products without a license on December 7, 2001, and are liable for that infraction. Accordingly, Respondents are liable for a fine of $500.00.

2. Respondents have requested a suspension or reduction of the fine for their admitted violation of D.C. Code § 47-2827(a). The record reflects that Respondents took no action to follow up with DCRA for nearly eleven (11) months following the expiration of their food license. This failure to exercise a reasonable level of due diligence weighs heavily against Respondents. If they had resolved this matter during the six months after the license lapsed, they would have been covered by a statutory safe harbor provision created by the Council and could not have been charged with an infraction. D.C. Code § 47-2851.10. This safe harbor provision appears to reflect a statutory intent to balance DCRA's

potential for inefficiency with the requirement that licensees must take some responsibility for pursuing licensure with due diligence.

3. Waiting for the passage of eleven (11) months and incurring liability for two unlicensed activity infractions before calling DCRA to follow up on their lapsed license does not amount to reasonable due diligence by Respondents. Waiting an additional two months after that before submitting their first written inquiry is also not due diligence. Under these circumstances, neither a reduction nor a suspension of the specified fine is appropriate. To grant a reduction or suspension on this record would amount to an improper substitution of this administrative court's judgement for that of the legislature. D.C. Code § 47-2851.10. *See also Sutherland Stat. Const.* § 2.01 (5th ed. 1994).

4. The record also indicates several other factors that prevent a reduction of the fine. Respondents have a history of non-compliance, as evidenced by their liability for the Notices of Infraction issued in September and November of 2000. Respondents' non-compliance was persistent in that they continued to operate for more than a year without a license. Further, the non-arrival of a renewal application and the lack of response to a single inquiry to DCRA back in late 1999 did not relieve Respondents of their responsibility to actively pursue a year 2000 license with due diligence.

5. A statutory penalty in the amount of $500.00 was assessed as a result of the untimely answer of Respondents to Notice of Infraction No. 00-30117. Because Respondents have failed to demonstrate good cause for their untimely answer, or a good faith attempt to comply with D.C. Code § 6-2712(f), Respondents remain

liable for the full amount of that penalty as required by D.C. Code §§ 6-2704(a)(2)(A) and 6-2712(f).

V. Order

Therefore, upon Respondents' answer and plea, their application for suspension or reduction of the fine, and the entire record in this case, it is hereby, this _____ day of _____, 2001:

ORDERED, that Respondents are jointly and severally liable for $500.00 fine and a $500.00 penalty. Respondents shall cause to be remitted a single payment totaling **ONE THOUSAND DOLLARS ($1,000.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715). A failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' license or permit pursuant to D.C. Code § 6-2713(f) and a lien being placed on their property; and it is further

ORDERED, that because this administrative court has no record that Respondents have made payment for this case in the amount noted above, if the Respondents contend that they have previously paid all or part of the amount due for the fine and penalty in this matter, they shall provide reasonable proof of payment within twenty (20) days of this order. If satisfactory

proof of payment for the pending amount due in this matter is provided, then no further payment shall be required; and it is further

ORDERED, that if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001.

FILED 06/29/01

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Paul Klein
Chief Administrative Law Judge